No. 83-95

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ERNEST S. PATTON, Superintendent,
SCI — CAMP HILL, and
HARVEY BARTLE, III, Attorney General
of the Commonwealth of Pennsylvania,
Petitioners,

v.

JON E. YOUNT,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

I. Whether extensive publicity prior to Yount's retrial repeatedly revealed prejudicial information from his first trial, information not officially in evidence against him at retrial, which so poisoned the general atmosphere of the community that actual juror prejudice resulted, infringing on his ability to select and empanel a fair and impartial jury under the Sixth Amendment and denying due process as prescribed by the Fourteenth Amendment to the Constitution of the United States?

II. Whether a federal court, in reviewing a state court conviction by way of habeas corpus, may, as a result of an independent evaluation of the mixed question of law and fact regarding jurors' opinions, disregard equivocal assurances of impartiality to find that the defendant was denied a fair and impartial jury as prescribed by the Sixth and Fourteenth Amendments to the Constitution of the United States?

III. Whether in reversing Yount's state court conviction, the United States Court of Appeals for the Third Circuit properly applied the standards regarding juror prejudice cited in *Murphy* v. *Florida?*

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OPINION BELOW

Following conviction, Respondent's direct appeal advanced his claims regarding jury prejudice to the trial court and to the Pennsylvania Supreme Court. The Memorandum of the trial court denying post-trial motions may be found in the Appendix at 262a; the opinion of the Pennsylvania Supreme Court affirming the judgment of sentence is reported at 455 Pa. 303, 314 A.2d 242 (App. 277a).

Upon review of Respondent's Petition for the Writ of Habeas Corpus, United States Magistrate Robert C. Mitchell recommended to the United States District Court that the writ issue. That recommendation may be found in the Appendix at 744a.

Respondent's Petition for the Writ of Habeas Corpus was denied by United States District Judge Donald E. Ziegler, Western District of Pennsylvania. The opinion is reported at 537 F.Supp. 873 (W.D. Pa. 1982) (App. 783a).

The opinion of the United States Court of Appeals for the Third Circuit reversing the order of the district court and ordering that Respondent be retried within a reasonable time or released, is reported at 710 F.2d 956 (3d Cir. 1983) (App. 833a).

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Third Circuit were entered May 10, 1983.

The Petition for the Writ of Certiorari was docketed with this Court on June 29, 1983; certiorari was granted on October 17, 1983.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. . . .

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT

On April 28, 1966, the body of Pamela Sue Rimer, an 18-year-old senior at the DuBois Area High School, was found shortly after her death in a sparsely wooded area near her home in Luthersburg, Clearfield County, Pennsylvania. Except for a stocking which was tied loosely around her neck and a shoe which was found under her body, she remained fully clothed. The autopsy revealed no indication that she had been sexually assaulted. Early the following morning, Jon E. Yount, a teacher of the victim, surrendered to the Pennsylvania State Police. He was arrested and charged with murder and rape.

Yount was 28 years old and had generally resided in Clearfield County during that period of time. He had graduated from Pennsylvania State University with a Masters Degree in Education. Married, the father of two small children, and a teacher of chemistry and mathematics for eight years at the DuBois Area High School, he had no prior criminal record. Previously, he had never been the subject of notoriety which would have drawn public attention or focused community prejudice against him.

The parties have stipulated that at the time pertinent to this appeal, rural Clearfield County had a population of 74,619, and that there were two newspapers, the Clearfield Progress (circulation of 16,250) and the DuBois Courier Express (circulation of 9,500), in general circulation within the county. In addition, there were a limited number of radio and television stations of local origin which Yount contends carried the same coverage of the case as did the two newspapers. (App. 407a, 408a, 464a, 478a, 484a).

Daily front page newspaper articles detailed the incident, the backgrounds of Yount and Rimer, the admissions of Yount and the seizure of what police believed were the murder weapons. The article that appeared in the Courier Express on May 3, 1966, contrasts a photograph of the decedent's parents at the burial service with large headlines "POLICE READ YOUNT STATEMENT AT HEARING" (App. 533a, 538a-540a). The statement quoted as being read at the hearing included specific details of the meeting between Yount and Rimer immediately preceding her death, the conversation that took place between them, the fight that occurred, including swinging a wrench at her several times, and his running from the scene of the crime. While three newspapers and one radio station representative covered the hearing, others reported that approximately 150 automobiles combined to form "probably the largest funeral procession in contemporary times" (App. 541a).

Pretrial motions for change of venue and suppression, as well as selection of the jury, were followed closely by the media. The trial commenced on September 28, 1966 in the City of Clearfield, County of Clearfield, Pennsylvania before Judge John Cherry. There was detailed front-page news coverage of the trial. The article on September 30, 1966 repeats statements made by Yount admitting hitting the decedent with a wrench and choking her as well as other details of the slaying. Newspaper coverage continued to repeat statements of Yount, referred to as his "story," that were ultimately suppressed by the Pennsylvania Supreme Court (App. 574a-576a).

The temporary insanity defense in the first trial was covered by the news media in great detail. Psychiatric testimony was presented by the defense that Yount was temporarily insane at the time of the incident. The newspapers reported that "[never before in Clearfield County judicial history has a larger group of medical men been assembled to testify at one trial . . .] this trial now is one of major proportions; and public and professional attention" (App. 611a). The testimony of Yount was reported verbatim in the media, especially as it related to his illnesses, his "brain damage" and as to the incident with the decedent (App. 586a-589a). To counter the testimony of the pathologist called by the Commonwealth, Dr. Cyril Wecht, Chief Forensic Pathologist of Allegheny County's Office of the Coroner in Pittsburgh, testified that the decedent had not been raped (App. 598a-599a).

Interwoven with the factual reporting was the constant reference to the subsequently suppressed statements. For example,

> And that is the way it was with much of Yount's testimony during the cross-examination. He wasn't recalling yesterday what he, himself, had written in his own handwriting of his meeting Pamela Sue Rimer on that red-dog road in Brady twp. April 28; or the oral statement he had given the district attorney's, several hours after he voluntarily appeared at the DuBois state police substation (App. 601a).

The reporting strayed far from the facts by such comments as the following,

> When quizzed about his handwritten statement and the oral statement, Yount became legalistic, avoiding any assumptions (App. 605a).

Yount testified as to meeting Rimer the day of the killing, fighting with her, having had a wrench in his hand and as to his lack of memory regarding other details. Headlines read: "EMOTION CHARGED TRIAL NEAR CLIMAX" (App. 623a).

A verdict of guilty of rape and murder in the first degree, with punishment set at life imprisonment, was returned by the jury on October 7, 1966. Front-page articles stated that "Courthouse observers had never in contemporary history seen such a large crowd to watch the departure of a convicted man from the courthouse." (App. 638a). Trial publicity culminated in seventeen consecutive editions for each county newspaper bearing banner headlines and multiple featured articles. The Progress adjudged Yount's trial to be the top news item of 1966.

Yount appealed from the judgment of sentence to the Supreme Court of Pennsylvania. In *Commonwealth* v. *Yount*, 435 Pa. 276 (1969) the court reversed the conviction and ordered a new trial because the written confession admitted into evidence was not preceded by warnings satisfying *Miranda* v. *Arizona*, 384 U.S. 436 (1966). His appeals had continued to receive detailed front-page coverage. The reversal of his conviction by the Supreme Court brought a new tide of headlines and publicity that included quotations from the majority opinion and a complete quotation of the dissenting opinion (App. 644a).

Yount returned to Clearfield County for retrial before the same judge and in the same courtroom. Pretrial motions for change of venue and for suppression of evidence resulted in hearings conducted by the trial court on June 5, July 29, and August 16, 1970. The court granted in part the motion to suppress but denied the motion for change of venue in a memorandum and order dated September 21, 1970 (App. 259a-261a). These events continued to receive front-page coverage, as well as radio and television review, that included the fact that Yount had been convicted of murder and rape (App. 651a-654a).

On November 4, 1970, jury selection commenced for the second trial of this case. Eleven days, at least six panels of prospective jurors, 1186 pages of testimony, and exhaustion of defendant's preemptory challenges were required to seat

twelve jurors and two alternates. The veracity of veniremen was eroded early in voir dire when graphic evidence of the depth of community sentiment against Yount surfaced in the testimony of Vera K. Krapf, a minister's wife. She admitted a bias against the accused resulting from an apparent conspiracy among members of her church who had attempted to influence her decision if she were chosen as a juror (App. 25a-27a). She was asked:

> Q Would your presence in serving as a juror create a difficulty in your parish?
>
> A Why yes—when people heard my name was on for this—countless people of the church have come to me and said they hoped I would take—the stand I would take in case I was called. I have had a prejudice built up from the people in the church.
>
> Q Is this prejudice, has it been adverse to Mr. Yount?
>
> A Yes it was. They all say he had a fair trial and he got a fair sentence. He's lucky he didn't get the chair.
>
> * * *
>
> A [T]o say that I could dismiss all that has been told and felt—and the church people—I haven't asked for any of this but they discuss it in every group—but they say now since you are chosen and you will be there we expect you to follow through—
>
> Q Notwithstanding what the Court would tell you, you feel that you would be subject to the retributions or retaliation of these people—
>
> A I think I would hear about it.

The suspicion that there were many veniremen similarly predisposed, (App. 512a) but who would not admit their bias as readily as Mrs. Krapf, was confirmed by the testimony of Connie Ives, a witness during the November 3, 1981 hearing before the federal magistrate (App. 473a). She testified that her father-in-law, Omar Ives had expressed a strong pretrial bias against Yount. However, Veniremen Ives testified that

he had no opinion (App. 137a, 145a). The defense also learned during a hearing before the trial court to challenge the array of the second panel of veniremen that members of the community had solicited subpoenas from deputy sheriffs to serve on the jury (App. 418a, 498a).

Following the exhaustion of the regular panel of jurors, Yount moved for a change of venue. The trial court denied the motion. Yount moved for a change of venue following the exhaustion of each of the subsequent five panels of jurors. The trial court denied each of these motions. Following a hearing on the motions on November 14, 1970, the trial judge revealed his uncertainty regarding the impartiality of the first ten (actually 11 but one was excused because her sister died) jurors by concluding that:

> [A]lmost all, if not all, jurors already seated had no prior or present fixed opinion (App. 264a, 499a, 503a).

Of the 163 veniremen examined during voir dire, 98% remembered the case; over 90% of those asked said they had discussed the case or heard others express their opinions; and 126, or 77%, admitted that they would carry an opinion of Yount's guilt into the jury box. The trial court excused 117 prospective jurors, or 72%, after they testified that they could not set aside their prejudice against Yount. Nine other veniremen, unsuccessfully challenged for cause by Yount, indicated they had an opinion which would change if he could convince them to do so. Yount preemptorily challenged six of those nine, one was seated as a juror and two were seated as alternate jurors. Twelve other veniremen stated that they had an opinion at one time but claimed the ability to dismiss their opinions if selected as jurors. One of those twelve was dismissed for cause, six were preemptorily challenged by Yount, and five were seated as jurors.

Of the twelve jurors and two alternates ultimately empanelled to hear the evidence, all but one were familiar with the case, several explicitly recalled Yount's prior conviction for the same crime or confessions, eight of the fourteen admitted

that they had formed an opinion as to his guilt, and at least four jurors stated that it would take evidence by Yount to overcome their belief.

Juror No. 1, Blair Hoover, said that he had read about the case and heard others express their opinions but had never developed a "true" opinion (App. 32a, 34a, 37a, 38a). Juror No. 2, Clair Clapsaddle, testified that he had recently discussed the case with others and had formed an opinion which could be set aside because "that's the way it's supposed to be." He displayed considerable uncertainty regarding Yount's responsibility to prove his innocence (App. 43a-46a, 49a, 50a). Juror No. 3, John T. Harshak, was familiar with the case through discussion and reading "a few years ago" and wanted to be on the jury (App. 209a, 216a). Juror No. 4 was John Yorke, a recent immigrant to Clearfield County and knew nothing about the case. Juror No. 5, Mary Jane Waple, stated that she "remembered that they said he was guilty before and I didn't understand why they were having another trial" (App. 70a-76a). She denied an opinion and said she would try to forget what she knew.

Juror No. 6, James F. Hrin, testified that he had a "solid" opinion (App. 86a). He was then asked:

Q Would you be able to change your mind regarding your opinion before becoming a juror in this case. That's the way I must have you answer the question?

A If the facts were so presented I definitely could change my mind.

Q Would you say you could enter the jury box presuming him to be innocent?

A It would be rather difficult for me to answer.

Q Can you enter the jury box with an open mind prepared to find your verdict on the evidence as presented at trial and the law presented by the judge?

A That I could do.

* * *

Q Did I understand Mr. Hrin you would require some—you would require evidence or something before you could change your opinion you now have?

A Definitely. If the facts show a difference from what I had originally been led to believe, I would definitely change my mind.

Q But until you're shown those facts, you would not change your mind—is that your position?

A Well—I have nothing else to go on.

After repeatedly stating that he would need evidence to change his opinion, Juror No. 6 responded "I don't know if that's the answer you want." When asked yet again if he could set his opinion aside, he replied, "I have to." (App. 83a-85a). The court denied Yount's challenge for cause.

Juror No. 7, Martin R. Karetski, testified that he had formed an opinion but that he was uncertain that he still had an opinion or that he could forget what he knew (App. 98a-100a, 113a-114a). This juror became jury foreman. Juror No. 8, Julia C. Hummel, had heard discussions of the case, and had had an opinion (App. 119a, 120a) although she had none at present except "what he had said himself—that he was guilty" (App. 125a). She was uncertain if she would consider what she already knew during deliberations (App. 128a, 129a). Juror No. 9, Jessie M. Parks, said she had thought Yount was guilty and wondered about the necessity for a new trial. She testified that "I could say I am biased" but would have to hear both sides before she could decide (App. 149a-151a).

Juror No. 10, Albert I. Undercoffer, had heard the opinions of others, had expressed his own opinion and had read about the case. Admitting that it would be difficult to forget what he knew about the case and base a verdict solely on evidence presented in the courtroom, he was asked (App. 163a, 165a, 166a):

Q Mr. Undercoffer . . . do you have an opinion as to Mr. Yount's guilt or innocence as of now?

A . . . I think that the court first tried Mr. Yount and then decided he was entitled to a new trial and my opinion is that if the Court says he is then he is. . . . [I] would want him to have every opportunity to prove his innocence. . . .

* * *

Q You want him to prove that?

A Yes (App. 165a).

Robert P. Murphy and Irene Kurtz, Jurors No. 11 and 12, respectively, stated they had read about the case but had no opinions (App. 174a, 176a, 177a, 186a, 190a, 194a). Alternate No. 1, David J. Chincharick, stated that he had an opinion that remained firm and fixed and which could not be put aside until evidence was presented (App. 234a-240a). Alternate No. 2, LaVerne B Pyott, said that she had a definite opinion which she could not dismiss and which only evidence could change. (App. 250a-252a).

Jurors Harshak and Kurtz (Nos. 3 and 12) and both alternates, Chincharick and Pyott, were seated over Yount's challenges for cause after he had exhausted his preemptory challenges. Although the alternate jurors did not participate in the jury's deliberations, both were sequestered with the jury for four days. They were instructed by the court that they were free to discuss the case with other jurors during sequestration.

The news media continued to deluge the community with front-page prejudicial information throughout the eleven days of voir dire. The selection of each juror merited an article and often a profile. Jurors Nos. 3, 8, 9, 10, 11, 12 and both alternates were selected from panels of veniremen other than the regular panel and were exposed to daily accounts regarding the questioning of veniremen, the difficulty in seating a jury, and Yount's prior conviction (App. 658a-671a, 422a). By the close of voir dire, the two county newspapers had printed 66 front-page articles on the appeals and retrial (App. 633a-670a).

The indictment for rape was quashed. Yount's retrial for murder before the same judge began on November 17, 1970. Verdicts available to the jury were first-degree murder (automatic sentence of life imprisonment), second-degree murder (discretionary sentence of 20 years or less), voluntary manslaughter (discretionary sentence of 12 years or less), and not guilty (App. 757a-758a). The degree of the offense could rise no higher than second-degree unless the prosecution carried its burden of proving the requisite intent to kill. Evidence of provocation or passion could reduce the killing to voluntary manslaughter.

The prosecution presented a substantially different case at retrial. Sexual assault was not an issue. The alleged oral and written confessions of Yount, as well as an alleged weapon (wrench) and bloodstained clothing of the accused, were suppressed. The difference in the defense was even more marked. Yount did not testify nor did he raise the defense of temporary insanity. Instead, he relied solely upon cross-examination and reputation witnesses, in order to seek an aquittal or conviction of a lesser included offense.

Much of the most prejudicial information, especially that related to the issue of "intent," publicized by the news media was never heard from the witness stand at retrial. The three-day trial was concluded on November 20, 1970. The jury found Yount guilty of first-degree murder and he was resentenced to life imprisonment. He is serving the sentence in the custody of Ernest S. Patton, Superintendent of the State Correctional Institution at Camp Hill, Pennsylvania.

Yount's timely post-trial motions alleging, *inter alia*, that the trial court erred in denying a change of venue and several causal challenges, were denied by that court on January 15, 1973 (App. 267a-276a). More than two years after retrial and without the benefit of a post-trial hearing, the trial court held that:

> [T]here was practically no publicity given to this matter through the news media . . . [between the first trial and

> retrial] except to report that a new trial had been granted by the Supreme Court. . . .
>
> . . . [W]e are satisfied that even where a juror may have had an opinion in the matter, the jury was without prejudice. . . . (App. 268a-269a).

Yount appealed to the Pennsylvania Supreme Court. The judgment of sentence was affirmed. *Commonwealth* v. *Yount*, 455 Pa. 303 (1974) (App. 277a-293a). The Supreme Court adopted the trial court's post-trial findings noting that:

> Neither does the voir dire, as appellant argues, " 'reveal a "clear and convincing" build-up of prejudice or a pattern of deep and bitter prejudice' shown . . . throughout the community" which would require a change of venue. . . .
>
> . . . [T]he record fails to disclose undue community prejudice. *Id.*, 455 Pa. at 312-314 (App. 284a-286a).

Pursuant to Title 28, United States Code, Section 2254, Yount filed a petition for writ of habeas corpus on January 5, 1981 (App. 297a-309a). On April 16, 1981, the Federal Public Defender's Office was appointed to represent Yount. The petition was referred to United States Magistrate Robert C. Mitchell for consideration of the allegation, *inter alia*, that:

> 12-B. Petitioner's conviction was obtained by a violation of his constitutional right to select and empanel a fair, impartial and "indifferent" petit jury.

Magistrate Mitchell conducted two evidentiary hearings, then issued a report and recommendation in which he recommended the writ be granted because "it does not appear that the Sixth Amendment mandate of a fair and impartial jury could have been met in the small rural community of Clearfield County" (App. 744a, 768a). United States District Judge Donald E. Ziegler rejected the recommendation of the magistrate with regard to contention "12-B," denied Yount's petition for writ of habeas corpus (*Yount* v. *Patton*, 537 F.Supp. 873 (W.D.Pa. 1982) (App. 783a), and issued an order that a "certificate of probable cause be and hereby is granted" (App. 810a).

Oral arguments for Yount's appeal of the district court's denial of his petition were heard by Judges Hunter, Garth and Stern of the United States Court of Appeals for the Third Circuit on December 17, 1982. In an opinion issued May 10, 1983, the circuit court unanimously held that Yount was denied his right to a fair trial by an impartial jury and ordered that the writ issue unless he was afforded a new trial within a reasonable time. *Yount* v. *Patton*, 710 F.2d 956 (3d Cir. 1983) (App. 833a). The court explicitly concluded that:

> Petitioner has shown that the pretrial publicity caused actual prejudice to a degree rendering a fair trial impossible in Clearfield County. After examining the totality of circumstances, we hold that petitioner's retrial was not fundamentally fair. *Id.*, 710 F.2d at 972.

The circuit court also found that the trial court had erred in denying several of Yount's challenges for cause. In its independent review, the circuit court found that there were nine veniremen unsuccessfully challenged for cause who had opinions which they could change only if Yount could convince them to do so. One of these nine was seated as a juror and six required the use of Yount's preemptory challenges. *Id.*, 710 F.2d 964, n. 13 (App. 848a). The court then emphasized that:

> In fact, as we have noted, the trial court refused to dismiss several veniremen who had expressed a disqualifying prejudice, and permitted some of them to sit as jurors. *Id.*, 710 F.2d at 970, n. 24 (App. 863a).

Judge Garth, in a concurring opinion, focused on the trial court's refusal to dismiss a juror with a disqualifying prejudice:

> In this case, a juror by his own admission, required the production of evidence to change his preconceived opinion of the defendant's guilt, and agreed to keep an open mind about this evidence if and when he heard it. . . . A defendant cannot constitutionally be convicted by a jury containing one such juror.
>
> * * *
>
> . . . Neither the trial court nor the Pennsylvania Supreme Court, however, considered the legal effect of Hrin's [the

> juror's] requirement that the defendant put on evidence to disabuse Hrin's [the juror] of his opinion. This latter requirement raises a presumption of partiality as a matter of law . . . *Id.*, 710 F.2d 981 (App. 889a, 890a).

The petition for writ of certiorari was filed with this Honorable Court on June 30, 1983. Certiorari was granted on October 17, 1983.

SUMMARY OF THE ARGUMENT

I. The Sixth and Fourteenth Amendments to the Constitution of the United States form an alliance to mandate federal court review of the protections provided citizens of the United States by the state courts against criminal conviction by a partial jury. The pretrial publicity surrounding the Yount trial infringed on his ability to select and empanel a fair and impartial jury. The publicity disclosed that the jury in the first trial had convicted Yount of murder, it disclosed written confessions, oral statements, and his testimony, and revealed testimony at the first trial of his plea of temporary insanity, and conviction of rape. The widespread dissemination of such extra-record information, while not rendering the jury presumptively prejudiced, poisoned the "general atmosphere of the community" in which Yount was retried. *Murphy* v. *Florida*, 421 U.S. 794, 802 (1975).

The atmosphere in the community caused actual prejudice in the jurors. Of the prospective jurors, 98% and all but one seated juror had read about the case. More than 90% of those asked had discussed the case or heard others express opinions. Of the veniremen questioned, 84% admitted to an opinion regarding Yount's guilt. None indicated they believed him innocent. Of the twelve jurors and two alternates who were selected, eight stated they had formed an opinion as to Yount's guilt before hearing testimony, and several explicitly recalled his confessions before conviction. The existence of such an opinion in the minds of the jurors raises a presumption of

partiality. *Reynolds* v. *United States*, 98 U.S. 145, 156-157 (1908); *Irvin* v. *Dowd*, 366 U.S. 717, 723 (1961).

Many of the fourteen jurors who heard Yount's case gave ambiguous, equivocal or negative responses when asked if they could forget what they had heard and set their opinions aside. At least four of the fourteen jurors stated they would require Yount to produce evidence to overcome their opinions. Having so stated, these jurors abandoned the presumption of innocence and as a matter of law, their admissions raise a presumption of partiality. A defendant cannot constitutionally be convicted by a jury containing even one such juror. *Irvin* v. *Dowd*, *supra*, 366 U.S. at 723, *Id.* at 728. In light of the pretrial publicity, the difficulty of voir dire, and the testimony of the jurors selected, despite juror assurances of impartiality, the jurors could not set aside their opinions and render a verdict based solely on the evidence presented in court. Pretrial publicity caused actual prejudice to a degree rendering a fair trial impossible in Clearfield County.

II. A factual finding of a state court in challenging a state conviction on a petition for a writ of habeas corpus is presumed to be correct unless it can be established by convincing evidence that the factual finding is erroneous. Title 28, United States Code, Section 2254(d) (1976). The state courts found that excessive pretrial publicity did not prevent a fair trial and that the voir dire did not reveal a clear and convincing build-up of prejudice or a pattern of deep and bitter prejudice shown throughout the community which would require a change of venue. The Third Circuit Court of Appeals made an independent evaluation of the factual findings and determined them to be erroneous.

In determining that the factual findings of the state courts regarding publicity were clearly erroneous, the circuit court noted that the publicity proceeding trial was extensive and had a great potential for prejudice. The court noted that the case was a "cause celebre" in a rural community which had been subjected to a barrage of publicity concerning a sensational murder. *Irvin*, 366 U.S. at 725. The court considered the

nature of the publicity as previously discussed in I of the Summary of the Argument, above, as carrying too great a risk of prejudice to be directly offered as evidence. The court rejected the conclusion of the state court that there was practically no publicity given to the matter between trial and retrial noting that the record contained at least 17 front-page articles during that period of time. The court rejected the finding of the trial judge that there was little talk in public concerning the second trial because of the testimony of veniremen indicating that there had been public discussion of the case. Thus, there was substantial evidence in support of the circuit court's determination that the state court's characterization of the news coverage was erroneous.

In regard to the finding of the state court concerning the community prejudice developed from voir dire, the circuit court held that the nature and strength of a veniremen's opinion is a mixed question of law and fact and must be independently evaluated by the court. *Irvin*, 366 U.S. at 723. The independent examination of the voir dire by the circuit court revealed that 77% of the veniremen questioned admitted that they would carry an opinion into the jury box. 72% of the jurors were excused by the trial court on challenges for cause. Ninety percent of those asked said they had discussed the case or heard others express their opinions. An independent evaluation of the voir dire of the twelve jurors and two alternates revealed that the prejudice permeating the voir dire and the community was reflected in their testimony. All but one of the jurors were familiar with the case, and several explicitly recalled Yount's conviction or confessions or both. Eight had formed opinions of his guilt or innocence. One juror stated it would take evidence to overcome his opinion. There was substantial evidence supporting the independent determination of the circuit court that the finding of the state courts regarding the absence of prejudice established during the voir dire was clearly erroneous.

III. The Third Circuit Court of Appeals in directing that the writ of habeas corpus shall issue specifically held that

Marshall v. *United States*, 360 U.S. 310, 313 (1959) was inapplicable. The court stated that Yount could not argue he had been denied an impartial jury simply because his jury had read of extra-record facts with a high potential for prejudice unlike a defendant seeking review of his federal conviction. Thus, the court required that actual prejudice be shown under *Murphy* v. *Florida*, 421 U.S. 794 (1975). Therefore, as indicated in II of the Summary of the Argument, an independent review of the record by the Third Circuit Court of Appeals revealed actual prejudice. The argument of petitioner that *Irvin* v. *Dowd*, 366 U.S. 717 (1961) is clearly distinguishable, is incorrect and the reliance of the Third Circuit Court of Appeals that the voir dire in this case strongly resembles *Irvin* is well taken. Both the publicity and the voir dire are remarkably similar in nature. The Court of Appeals for the Third Circuit was correct in its finding that actual prejudice existed to such a degree that a fair trial was rendered. Given the pervasive community knowledge of the facts of this case and the prevailing opinion as to Yount's guilt, as well as the strong community hostility towards him, it does not appear that the empanelled jury was "capable and willing to decide the case solely on the evidence before it" but rather at best required him to prove his innocence or at least overcome strong preconceived notions as to his guilt. Under such circumstances, it does not appear that the Sixth Amendment mandate of a fair and impartial jury could have been met in the small rural community of Clearfield County (App. 768a).

ARGUMENT

I. EXTENSIVE PUBLICITY PRIOR TO YOUNT'S RETRIAL REPEATEDLY REVEALED PREJUDICIAL INFORMATION FROM HIS FIRST TRIAL, INFORMATION NOT OFFICIALLY IN EVIDENCE AGAINST HIM AT RETRIAL, WHICH SO POISONED THE GENERAL ATMOSPHERE OF THE COMMUNITY THAT ACTUAL JUROR PREJUDICE RESULTED, INFRINGING ON HIS ABILITY TO SELECT AND EMPANEL A FAIR AND IMPARTIAL JURY UNDER THE SIXTH AMENDMENT AND DENYING DUE PROCESS AS PRESCRIBED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

A. Introduction

The Sixth Amendment to the Constitution of the United States guarantees to an accused the right to be tried by an "impartial jury." The due process clause of the Fourteenth Amendment requires the states to effectuate that right by providing an accused with a fair trial "by a panel of impartial, 'indifferent' jurors." *Irvin* v. *Dowd*, 366 U.S. 717, 722 (1961).

The question presented in this case, then, becomes one of whether the trial court, given the pretrial publicity surrounding Yount's arrest, first trial, successful appeals, hearings prior to retrial, and portions of voir dire, as well as evidence of the resulting bias of Clearfield County citizens against the accused elicited during jury selection, applied adequate safeguards to protect Yount's right to a fair trial by impartial and indifferent jurors. These jurors must not only be "willing" to put aside any preconceived opinions regarding a defendant's guilt, but must be "capable" of deciding the case solely on the evidence presented in court. *Smith* v. *Phillips*, 455 U.S. 209, 217 (1982); *Murphy* v. *Florida*, 421 U.S. 794, 799 (1975). Although many veniremen stated a willingness to lay aside opinions regarding Yount's guilt, these jurors were incapable of doing so in light of the community's sentiment against him. A juror's assurance that he can enter the jury box without an opinion is not dispositive if the accused can demonstrate "the

actual existence of such opinion in the mind of the juror as will raise the presumption of partiality." *Murphy*, 421 U.S. at 800.

The issue in this case does not contrast a First Amendment freedom of the press issue against a Sixth Amendment right of a defendant to a fair and impartial jury (Petitioners' brief, page 11). The issue is not one of the media's right to fairly report the facts surrounding a criminal case, nor the manner in which that information was portrayed. The issue in this case is whether the publicity revealed prejudicial information not in evidence which poisoned the general atmosphere of the community resulting in actual juror prejudice. The resolution of that issue involves a determination of whether Yount received a fair trial by a panel of impartial, indifferent jurors mandated by the Sixth and Fourteenth Amendments. In *Irvin*, 366 U.S. at 725-28, the Court considered the extent and content of the publicity as an indicator of "the then-current community pattern of thought," then reviewed the voir dire for opinions expressed by veniremen and the difficulty in finding prospective jurors who could at least claim impartiality, and finally, examined the testimony of seated jurors for reflections of that community prejudice.

B. The Instant Case Exhibits Publicity Preceding Retrial So Extensive And Of Such Inflammatory Nature As To Deem That Publicity Inherently Prejudicial.

Petitioner concedes that this case received substantial publicity within the Clearfield County area. Petitioner does not suggest that publicity in any significant amount extended beyond the county. Examples of coverage by the two county newspapers demonstrate the extensive nature of the publicity within the county; however, it was the nature of the information revealed by that coverage that was most damaging to Yount (App. 406a, 407a, 452a, 453a, 473a, 474a). These newspaper articles, which received front-page coverage and often banner headlines repeatedly revealed the following concerning Yount: that he had surrendered to the police; that he had been charged with murder and rape; that he had given the police a

written and two oral confessions; that he had led police to a wrench described as the "murder weapon;" that he had relied on the defense of "temporary insanity" complete with the testimony of opposing medical experts regarding "brain damage" and his frame of mind; that he had given an in-court confession; and, most prejudicial, that he had been convicted by a jury of first-degree murder and rape and sentenced to life imprisonment.

The community's collective memory was repeatedly refreshed by front-page reports of his post-trial motions and successful appeal to the Pennsylvania Supreme Court. The lone dissenting opinion of the Chief Justice was published verbatim. *Commonwealth* v. *Yount*, 435 Pa. 276 (1969) (App. 644a, 762a). Magistrate Mitchell and the United States Court of Appeals for the Third Circuit found that "the publicity was understandably most extensive and most prejudicial before and during (Yount's) first trial . . ." (App. 86a). However, the circuit court also found that the publicity continued in 66 front-page articles in the two county newspapers during the four years between Yount's first trial and the conclusion of voir dire at retrial (App. 847a). Front-page coverage during this time included: "YOUNT IS GUILTY; GIVEN LIFE TERM," "MORE DETAILS OF YOUNT'S JURY DELIBERATION," "YOUNT RULING BRINGS PROPOSED LEGISLATION," "DA REILLY TRYING TO STOP RETRIAL OF SLAYER YOUNT" (App. 630a, 639a, 640a, 645a, 646a).

Few revelations could be so damning to Yount as publicity that the jury had previously convicted him of the murder, as well as the rape, (App. 406a, 407a, 452a, 453a, 473a, 474a) of the decedent, *United States* v. *Williams*, 568 F.2d 464, 471 (5th Cir. 1978), except, possibly, the disclosure of Yount's written confessions and his in-court testimony. *See Nebraska Press Association* v. *Stuart*, 423 U.S. 1327 (1975) (on reapplication for stay); *Rideau* v. *Louisiana*, 373 U.S. 723 (1963). Yount did not testify at retrial. His written confessions were suppressed. The two brief oral statements admitted at retrial did not convey the prejudicial information of the written

confessions or trial testimony. *See Stroble* v. *California*, 343 U.S. 181, 195 (1952). This highly inflammatory information was too inherently prejudicial to be put into evidence, *Marshall* v. *United States*, 360 U.S. 310, 312-13; "the exclusion of such evidence in court is meaningless when the news media makes it available to the public." *Sheppard* v. *Maxwell*, 384 U.S. 333, 360 (1966); *Murphy*, 421 U.S. at 802. Any subsequent court proceedings in a community so pervasively exposed to such a degree of prejudicial information could be but a hollow formality.

C. Difficulty Of Voir Dire Provides Overwhelming Evidence That Community Atmosphere Was Poisoned Against The Accused So As To Impeach Any Stated Indifference Of His Jurors.

Here, as in *Irvin*, a "cause celebre" case in a rural community, barraged by publicity regarding a sensational slaying, impartial jurors were hard to find. *Irvin*, 366 U.S. at 727. Although four years had elapsed between trials, voir dire revealed that more than 98% of the veniremen questioned remembered the case and over 90% of those asked said that they had discussed the case or heard others express opinions. Many veniremen volunteered that they believed Yount to be guilty. None said he was not guilty. The passage of time may work to erase highly prejudicial publicity from the community's memory, *Murphy*, 421 U.S. at 802; *Beck* v. *Washington*, 369 U.S. 541, 556 (1962). However, in this case, repeated community exposure kept fresh the imprint of the case in the minds of the public. Veniremen indicated during voir dire that extensive public discussion of the case had occurred, especially in the last weeks before retrial. The United States magistrate found "a strong community hostility toward (Yount)" and a "pervasive community knowledge of the facts of this case" (App. 768a).

Voir dire took eleven days, (App. 669a, 670a) 1186 pages of testimony, at least six panels of veniremen, and exhausted Yount's preemptory challenges. Of 163 prospective jurors

questioned, 126 or 77%, admitted they would carry an opinion of Yount's guilt into the jury box; 117 of those 126 veniremen were excused for cause by the trial court because they could not set aside their opinions. Twelve others admitted to an opinion they believed they could disregard. Thus, more than 84% of those examined admitted to an opinion regarding Yount's guilt. In *Irvin*, 366 U.S. at 727, the Court found that almost 90% of those asked entertained some opinion as to guilt and "readily found actual prejudice against the petitioner to a degree that rendered a fair trial impossible." *Murphy*, 421 U.S. at 798.

Other indications of deep and bitter prejudice against the accused were revealed during voir dire. A minister's wife testified that she had formed an opinion adverse to the accused because of opinions she had heard discussed over the years in church groups and stores, and that church members had attempted to persuade her to vote for conviction if she became a juror. A deputy sheriff told of citizens soliciting subpoenas for jury duty. Evidence produced at an evidentiary hearing before the federal magistrate confirmed Yount's belief during jury selection that potential jurors have veiled strong feelings against him during voir dire.

Confronted with such explicit evidence of deep community bias, the trial court's reluctance to grant casual challenges and refusal to change venue, (App. 731a) and with but 20 preemptory challenges to exercise, it became incumbent upon Yount to attempt to select the jurors least biased and prejudicial against him (App. 497a). Of most concern was the incredulous testimony of veniremen who claimed no knowledge of the case (App. 512a) or who could give blanket assurances of impartiality (App. 866a). When so many jurors admit prejudice, the assurances of the remainder that they are impartial may be realistically rejected. *Irvin*, 366 U.S. at 728. "It is more probable that they are part of a community deeply hostile to the accused and more likely they may unwittingly have been influenced by it." *Murphy*, 421 U.S. at 800.

Therefore, Yount attempted to preserve his preemptory challenges for those veniremen whose testimony was unbelievable. Although preemptory challenges are not intended to correct erroneous decisions by the trial court, too often Yount was required to use them on veniremen who admitted to disqualifying prejudices but who survived challenges for cause. The circuit could found that Yount used twelve preemptory challenges to avoid veniremen who testified to opinions of his guilt (App. 849a, n. 13, n. 14; App. 863a, n. 24). Twenty preemptory challenges become meager, indeed, when 60% of them are required to eliminate admittedly biased jurors, leaving only eight challenges with which to defend against veniremen that he perceived to be less than truthful in the voir dire testimony.

Voir dire in this case strongly resembled that of *Irvin*. The opinions expressed by potential jurors and the difficulty in finding veniremen who could at least claim impartiality demonstrate a pattern of deep and bitter prejudice within the community. Even the trial judge admitted during the hearing before Magistrate Mitchell that "I recall there was a lot of comment, feeling against him . . . after he was sent to prison." (App. 711a). Yount asserts he has shown that "the publicity has been so extreme as to cause actual prejudice to a degree rendering a fair trial impossible." *Murphy*, 421 U.S. at 797; *Martin* v. *Warden*, 653 F.2d 799, 805 (3d Cir. 1981), *cert. denied*, 454 U.S. 1151.

D. Prejudice Against Yount That Permeated The Voir Dire And The Community Was Reflected In The Twelve Jurors And Two Alternates Ultimately Seated.

In determining whether a fair and impartial jury has been accorded, a distinction is to be made "between mere familiarity with the (accused) or his past and an actual predisposition against him." *Murphy*, 421 U.S. at 800, n. 4. It should be noted at this point that Yount, unlike Murphy, did not have a history that called community attention to himself.

Yount's attorney at the retrial testified before Magistrate Mitchell that the defense strategy had changed by the time of the second trial, because of the drastic difference in the state's case, in order to seek an acquittal or conviction of a lesser included offense (App. 430a). At the time of his retrial, the possible verdicts available to the jury were first-degree murder, second-degree murder, voluntary manslaughter and not guilty.

To obtain a verdict of first degree-murder, the prosecution was required to prove it was willful, deliberate and premeditated. Second-degree murder included any unlawful killing where there was no intention to kill. Voluntary manslaughter consisted of an intentional act and unlawful killing without malice, committed under the influence of sudden passion.

Both the prosecution and defense changed dramatically in the second trial. Yount's written and most of his oral statements were suppressed. The wrench and all references to it were suppressed. The bloody clothing of Yount was suppressed. Yount was not accused of rape.

The change in the defense was just as dramatic. An insanity defense was not presented as in the first trial. Yount did not testify. Friends, relatives, neighbors, and teachers who worked with him, testified as to his excellent character and reputation in the community.

No evidence was presented that would indicate that the intent was formed prior to the meeting of Yount and Rimer on the date of the incident. The evidence placed a man fitting Yount's description at the scene for a short period of time, perhaps as short as five minutes. No murder weapon was identified. A man fitting Yount's description was observed driving from the scene in an erratic and weaving fashion.

Jurors were called upon to evaluate the circumstantial evidence presented by the Commonwealth to determine whether willful, deliberate and premeditated intent had been proven beyond a reasonable doubt. The application of the law to the facts required an objective analysis by fair and impartial jurors

to effect a fair trial. Had the Commonwealth proved beyond a reasonable doubt a willful, intentional and premeditated murder? Was there no intent to kill because of the shortness of time and lack of evidence of premeditation? These were questions the jury had to resolve.

On the other hand, the jury had to apply the presumption of innocence. Furthermore, that presumption had to be considered along with the evidence of Yount's good character and reputation. Given the brevity of time for confrontation with the victim, testimony that she could have lived for up to 30 minutes following the infliction of the wound, the ferocity of the attack, and the speedy surrender of Yount, the jury could have found a sudden crime of passion rather than a premeditated intent to kill.

The evaluation of these facts and the application of the law required impartial determination to result in a fair trial. Juror Hrin performed this function having formed an opinion from what "was written up in the papers . . ." (App. 83a). Of course, what was in the papers included the prior conviction for rape and murder as well as the suppressed evidence and other testimony not before this jury. Hrin testified before he could change that opinion he "definitely" would "require evidence" that would "show a difference from what I had originally had been led to believe . . ." (App. 85a) When asked whether he could enter the jury box presuming Yount innocent he replied, "[I]t would be rather difficult for me to answer" (App. 84a). With the reliance on character evidence, it is difficult to imagine how Hrin could have set aside his opinion; how he could have concluded that he had been shown a difference from what he had originally believed. Is it reasonable to assume that a juror that would require Yount to produce evidence to change his opinion would first require the Commonwealth to prove Yount guilty of first-degree murder beyond a reasonable doubt? While Juror Hrin presents the clearest example of juror bias, it is only a single example of the prejudice to Yount caused by the circumstances of those jurors who read, heard, discussed and formed opinions. These were the jurors who not

only determined the issue of guilt or innocence, but also the degree of guilt.

Here, all but one of the fourteen seated jurors were familiar with the case. Several explicitly recalled Yount's confessions or conviction for the same offense.

> A prospective juror who has been exposed to and remembers reports of highly significant information, such as the existence or contents of a confession, or other incriminating matters that may be inadmissible in evidence, or substantial amounts of inflammatory material, shall be subject to challenge for cause without regard to the prospective juror's testimony as to state of mind. *ABA Standards for Criminal Justice*, Standard 8-3.5(b) (1982).

Eight jurors admitted that they had formed opinions as to his guilt before hearing testimony. In a community deluged by publicity and public discussion regarding Yount's prior conviction for the first-degree murder and rape of the decedent, his detailed oral and written confessions and testimony, his defense of temporary insanity, and where 77% of those called admitted to a disqualifying prejudice, requests that jurors put their preconceived impressions and opinions aside took insufficient account of the frailties of human nature. *Irvin*, 366 U.S. at 728. The circuit court found that the trial court could have found that a fair trial was impossible in Clearfield County not because of a particular juror but regardless of particular jurors (App. 866a, n. 27). Implicit approval of challenging jurors in this manner is evident in that neither the trial court (App. 262a-269a) nor the Pennsylvania Supreme Court (App. 284a-286a) found any relevance in Yount's failure to make specific causal challenges of nine jurors. Judge Stern, concurring in the opinion of the court of appeals, stated that:

> . . . even if such self-imposed amnesia is possible as a cognitive event, surely its prediction is not reliable-that is, we cannot expect a person to know with any degree of accuracy at the time of voir dire whether or not he will be able to lay aside an opinion, however desirous he is of achieving that end (App. 869a).

It is not surprising that when asked whether they could forget what they had heard and set their opinions aside, many of the jurors gave ambiguous, equivocal or negative responses. Theirs was a "community bias" as well as an individual one (App. 473a, 474a). "The influence of an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man." *Irvin*, 366 U.S. at 727. A juror, though willing to disregard prejudice, is more likely incapable of doing so when that impression or opinion is nurtured and reenforced by three-quarters of his peers. Yount's jurors had abandoned the basic principles of a fundamentally fair trial. It is highly unlikely such biased jurors would presume Yount innocent or require the Commonwealth to sustain its high burden of proving guilt beyond a reasonable doubt. Magistrate Mitchell determined that the empaneled jury was incapable of deciding the case solely on the evidence before it "but rather at best required the (accused) to prove his innocence or at least overcome strong, preconceived notions of his guilt" (App. at 768a).

The court of appeals noted that "even such equivocal assurances of impartiality were preferable to the open admissions of prejudice made by Juror Hrin and the two alternates, who went 'so far as to say that it would take evidence to overcome their belief' " (App. 866a). Jurors No. 3, 6, (Hrin), 12 and both alternates, were challenged for cause, all but Hrin following exhaustion of Yount's preemptory challenges. In this case, challenges for cause of potential jurors were resolved by the trial court in the presence of the challenged veniremen. The tempering effect on the juror's responses after being questioned by the trial court, defense counsel and the prosecutor is evidenced in the testimony of Juror Hrin. Because of the inflammatory nature of this confrontation between veniremen and the defendant regarding their abilities as jurors, Yount was reluctant to challenge for cause veniremen on whom he felt he could not afford to use preemptory challenges (App. 424a). As noted previously, the defense was forced to apply twelve of its twenty preemptory challenges to veniremen who admitted to harboring opinions adverse to Yount.

Although he did not directly challenge nine of the jurors empaneled to hear this case, Yount challenged jurors as groups at least six times when he moved for a change of venue on the basis that it was impossible to empanel impartial jurors in Clearfield County (App. 417a, 419a, 694a, 716a, 717a). Pennsylvania law at the time of retrial required only that objections be made before the jury retired to deliberate, Pennsylvania Rules of Criminal Procedure, Rule 1106(d) (App. 866a-867a). He challenged the partiality of the jurors after seating Jurors No. 1, 2 and 4; he twice challenged after Jurors No. 5, 6 and 7 were added to the panel. Another challenge occurred after the seating of Jurors No. 8 and 9 and again following the addition of Jurors No. 10, 11 and 12. By that time Yount had exhausted his preemptory challenges. Finally, the defense challenged again by moving for a change of venue after the seating of Juror No. 3 and both alternates. Yount did not wait a number of years, as asserted by petitioner, to challenge the partiality of his jurors. The trial court could have dismissed any of those jurors at that time if it determined, during the resolution of the motions for change of venue that Yount's claim of juror partiality was valid.

Yount did specifically challenge Juror Hrin and the two alternates for cause. He pursued this issue in post-trial motions and direct appeal to the Pennsylvania Supreme Court. The latter concluded that "none of the jurors had a fixed opinion as to (Yount's) guilt or innocence." *Commonwealth v. Yount*, 455 Pa. 303, 314 (1974). This allegation was included in his petition for writ of habeas corpus (App. 300a-303a) and was argued and briefed before the lower courts.

The circuit court explicitly found that at least one of Yount's jurors at retrial admitted to a disqualifying prejudice:

> [A]s we have noted, the trial court refused to dismiss several veniremen who had expressed a disqualifying prejudice, and permitted some of them to sit as jurors. (App. 863a, n. 24)

Judge Hunter concluded:

> There were . . . veniremen, unsuccessfully challenged for cause by petitioner (Yount), who indicated that they

> had an opinion which they could change only if the petitioner [Yount] could convince them to do so (App. 848a).
>
> * * *
>
> Petitioner [Yount] preemptorily challenged six of those . . . veniremen, one was seated as a juror, and the remaining two were seated as alternates. . . . (App. 848a, n. 13).

Judge Garth, concurring, found that Juror Hrin:

> [B]y his own admission, required the production of evidence to change his preconceived opinion of the defendant's guilt, and agreed to keep an open mind about this evidence if and when he heard it (App. 889a).

Yount asserts that the totality of circumstances, in light of extensive pretrial publicity, difficulty of voir dire, adverse community sentiment and the reflection of that sentiment in the testimony of the fourteen jurors who heard the evidence presented in court, demonstrates that despite their often equivocal assurances of impartiality, the jurors were incapable of setting aside their opinions and rendering a verdict based solely on that evidence. Although the trial court sequested the jury, "sequestered" potential jurors, admonished each of the six panels of veniremen not to read about or discuss the case, and permitted a relatively wide latitude during voir dire examination, the combination of these measures was ineffective in neutralizing prejudicial pretrial publicity. This is especially true absent a liberal granting of causal challenges. The collective prejudice of the fourteen jurors finally chosen illustrates that nothing less than a change of venue would have protected Yount's right to a fundamentally fair trial.

II. A FEDERAL COURT, IN REVIEWING A STATE COURT CONVICTION BY WAY OF HABEAS CORPUS, MAY, AS A RESULT OF AN INDEPENDENT EVALUATION OF THE MIXED QUESTION OF LAW AND FACT REGARDING JURORS' OPINIONS, DISREGARD EQUIVOCAL ASSURANCES OF IMPARTIALITY TO FIND THAT THE DEFENDANT WAS DENIED A FAIR AND IMPARTIAL JURY AS PRESCRIBED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

No one is to forfeit his liberty as criminal punishment until he has been fairly tried in a public tribunal, free of prejudice and passion. *Chambers* v. *Florida*, 309 U.S. 227, 236 (1940). The Sixth Amendment guarantees to a criminal defendant the right to a trial "by an impartial jury" in the state in which the crime was committed. The Fourteenth Amendment further provides that the state shall not abridge that right to an impartial jury or deny liberty without due process of law. The combination of these guarantees leads to the corollary that the federal courts have a specific mandate to supervise the state courts' selection of juries and jurors. This Court has held that the questions involved in evaluating jury selection are of both law and fact. *Irvin*, 366 U.S. at 723.

Petitioner's heavy reliance on *Sumner* v. *Mata*, 449 U.S. 539 (1981), and Title 28, United States Code, Section 2254(d), which require that a state court determination after a hearing on the merits of a "factual issue . . . shall be presumed to be correct," is misplaced. In addition, there is little conflict concerning the relevant facts in this case. There is no dispute that pretrial publicity was extensive in Clearfield County. There is no significant debate regarding the accuracy or the content of that publicity; in fact, it was the relative accuracy of coverage of Yount's arrest, confessions, in-court testimony, insanity defense, conviction of murder and rape, appeals, and retrial voir dire that created the difficulty in jury selection, especially in a rural area. The voir dire reveals the following facts; the trial court's excusal for cause of 72% of the veniremen, the

revelations of community sentiment against Yount, public discussions and publicity regarding the case, and public knowledge of facts not in evidence at retrial. Yount's repeated motions for change of venue, the number of panels of potential jurors questioned, and the prospective and seated jurors to whom casual or preemptory challenges were applied are uncontested facts.

Although the court of appeals, specifically citing Title 28, United States Code, Section 2254(d), did dispute the factual findings of the trial court regarding the amount of publicity between trials (App. 861a, n. 21) and public discussion in the weeks prior to retrial (App. 861a, n. 22), the conflict in this appeal centers around whether the publicity was so inflammatory, the community atmosphere so poisoned, the jury so predisposed to convict, and certain jurors were so prejudiced that Yount was denied an impartial jury. The issues presented to the federal courts in the instant case require the application of constitutional principles to the facts, for the most part, as found. The duty for such adjudications lie with the federal courts, *Brown* v. *Allen*, 344 U.S. 443, 507 (1953), which must independently evaluate the voir dire testimony of potential and empaneled jurors. *Irvin*, 366 U.S. at 723.

The trial court did not consider the legal effect of evidence of community and juror prejudice elicited during voir dire. The trial court denied a subsequent motion for change of venue following the seating of the first ten jurors and the exhaustion of five panels of veniremen. With no indication that he reviewed the testimony elicited during voir dire to that point, the state court concluded, "almost all, if not all, jurors already seated had no prior or present fixed opinion." Apparently preoccupied with conserving "time and money" the trial judge again did not consider the legal implications of a trial by jury which he could not unequivocally declare free of disqualifying bias. The state fact-finder, absent a post-trial hearing, denied Yount's post-trial motions without providing an indication of the standards applied other than it had "satisfied all requirements of the Pennsylvania Rules of Criminal Procedure" to

determine that the trial court "perceived no bias or prejudice" and that "the jury was without prejudice" (App. 268a, 269a). The court of appeals properly conducted an independent evaluation of the mixed question of fact and law regarding the question of jury and juror impartiality (App. 859a, n. 20), concluded that the widespread dissemination of prejudicial information from his first trial had poisoned the general atmosphere of the community (App. 862a), and rejected the trial court's finding that the jury was without prejudice (App. 865a, n. 26).

The trial court found that Juror Hrin entered the jury box with a "solid opinion" adverse to Yount. However, the Pennsylvania Supreme Court concluded that "none of the jurors had a fixed opinion." *Yount*, 455 Pa. at 314. Neither state court considered the legal effect of this juror's requirement that Yount produce evidence to overcome his "solid opinion." The circuit court found that Hrin, unsuccessfully challenged for cause by Yount, had expressed a disqualifying prejudice (App. 863a, n. 24). Judge Garth, concurring, concluded that as a matter of law, Hrin's testimony raised a presumption of partiality under *Irvin* (App. 887a).

Likewise, the state courts did not consider the legal effect upon Yount's right to an impartial jury of the two alternates who admitted they would, like Hrin, require him to produce evidence to overcome their opinions of his guilt (App. 853a). Although these alternates did not participate in the jury's formal deliberations, they were seated and sequestered for four days with the twelve jurors who finally rendered the verdict of first-degree murder. The jurors were instructed by the trial court that they could discuss the case among themselves while sequestered. The circuit court found that:

> [S]uch a sustained condition of "continuous and intimate association" operates to subvert the requirement that the jury's verdict be based on evidence developed from the witness stand. *See Turner* v. *Louisiana*, 379 U.S. 466, 472-73 (1965) (App. 865a, n. 25).

Petitioner's brief contains several errors with regard to its criticism of the factual determinations of the court of appeals (pages 30-31). First the Commonwealth fails to cite Judge Hunter's reference to Title 28, United States Code, Section 2254(d) found in footnote 20 of his opinion (App. 859a), where the circuit court established the basis for review in this case.

Secondly, the finding by the court of appeals that 66 front-page articles reported the facts of this case between the conclusion of the first trial and the conclusion of voir dire at retrial is not only correct but also the most relevant factual finding regarding then-current publicity that reached the jurors. It is important to note that only six of the final fourteen jurors were selected from the regular panel of veniremen. The remaining eight jurors were selected from the fourth, fifth, and sixth panels of prospective jurors, all of whom had ample opportunity for exposure to all but a few of those 66 articles. (No jurors were selected from the second and third panels of potential jurors called.) These eight jurors were repeatedly exposed to the highly inflammatory information that Yount was again being tried for murder and rape, that there was great difficulty in selecting a jury, and that most jurors were expressing strong opinions of his guilt. (App. at 658a, 670a, 703a). Four of these jurors were selected on November 16, 1970, the final day of voir dire!

Also, the court of appeals did not *assume* that much public discussion about this case occurred just prior to retrial. The court was relying on specific testimony elicited from potential jurors who were a cross-representation of the community (App. 861a, n. 22). The nature of the articles referred to in the preceding paragraph lends credence to the circuit court's finding. In contrast, the conclusion of the trial court, "as far as this Court can recall there has been little if any talk in public," was a personal observation negated by the testimony of many veniremen (App. 264a) and later contradicted by the trial judge himself (App. 711a).

Finally, petitioner erroneously asserts that state court findings: 1) that there was no indication whatsoever that pretrial

publicity had caused prejudice to Yount such that a fair and impartial jury could not be selected; and, 2) that voir dire did not reveal a pattern of deep and bitter prejudice which would require a change of venue; are factual findings to be held presumptively correct under Title 28, United States Code, Section 2254(d). These are mixed questions of law and fact. *See also, Cyler* v. *Sullivan*, 446 U.S. 335, 341 (1980). (A determinaton of whether counsel undertook multiple representation is not a finding of fact.)

The court of appeals made a specific finding that Yount had established by convincing evidence that particular factual determinations of the state courts were not fairly supported by the record. Judge Hunter, writing for the court, found that many of Yount's jurors gave equivocal answers when asked if they could set their opinions of his guilt aside (App. 866a). The circuit court properly rejected those uncertain and equivocal statements of impartiality "where so many, so many times, admitted prejudice." *Irvin*, 366 U.S. at 728. The court then concluded that the totality of the circumstances surrounding the empaneling of the jury, as a matter of law, demonstrated actual prejudice to a degree denying Yount a fundamentally fair trial.

III. IN REVERSING YOUNT'S STATE COURT CONVICTION, THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT PROPERLY APPLIED THE STANDARDS REGARDING JUROR PREJUDICE CITED IN *MURPHY* v. *FLORIDA*.

Marshall v. *United States*, 360 U.S. 310 (1959) has no application beyond the supervision of federal trials. *Murphy*, 421 U.S. a 798. The Court of Appeals for the Third Circuit agreed, stating:

> The petitioner challenging his state court conviction in a habeas corpus proceeding must shoulder a particularly heavy burden. Unlike a defendant seeking review of his federal conviction, the petitioner cannot argue that simply because his jury has read of extra-record facts with a high

> potential for prejudice, a federal court must presume that the jury was prejudiced . . . Petitioner [Yount] must therefore show "that the publicity has been so extreme as to cause actual prejudice to a degree rendering a fair trial impossible" (App. 858a).

Thus, the curciut court established the standard by which it would review Yount's petition, explicitly rejecting *Marshall* in lieu of the more stringent standards of *Irvin*, *Murphy*, and Title 28, United States Code, Section 2254(d).

Murphy was tried in a densely populated urban area, a fact mirrored in the low percentage of veniremen adversely affected by pretrial publicity. Very little about the instant case resembles *Murphy* except the underlying issue of juror impartiality. Petitioner asserts that *Irvin* is "wholly inapplicable" to this case. However, each case involves a sensationalized homicide in a rural community that was barraged by prejudicial publicity disseminating inflammatory information (App. 473a, 474a). Reports of Yount's "prior" convinction for the same offense, his conviction of the "related charge" of rape, his oral and written confessions, his in-court admissions, and his insanity defense could be deemed no less prejudicial than media reports of Irvin's alleged involvement in other homicides and burglaries, identification, prior record, confession and offer of a guilty plea. As in *Irvin*, much of the information reported in Yount's case would not be disclosed from the witness stand at retrial.

The similarities do not end there. The difficulty in seating a jury, the evidence elicited during voir dire of strong community sentiment, the percentage of community representatives who would admit to an opinion of the defendant's guilt, and the reflection of the foregoing in the opinions of seated jurors are equivalent. The most significant similarity between these cases is the almost 90% and 84% proportion of the prospective jurors who expressed opinions regarding the defendants' guilt, as did more than half of the seated jurors in each case. It becomes apparent that where, as here, there were so few that had not formed an opinion, the inquiry of voir dire merely

became one of whether the juror could lay aside his impression or opinion and render a verdict based on the evidence presented in Court. No measure of protection of the defendant's right to an impartial jury less than a change of venue would be adequate uner such circumstances. *See United States ex rel., Bloeth* v. *Denno*, 313 F.2d 364, 368-369 (2d Cir. 1962).

In all but such cases, an adequate voir dire may suffice to ensure an impartial jury. However, in *Irvin*, as here, where the community was so prejudiced against the defendant, the most properly conducted voir dire could not ferret out all of the hidden prejudices that were the product of that community sentiment. If a juror honestly, but mistakenly, believes that he can remain impartial throughout a trial, no amount of questioning will lead to an admission of prejudice. Rather, the juror will vehemently deny any accusations of bias. *Smith* v. *Phillips*, 455 U.S. 209, 224 (1982) (dissenting opinion).

Recognizing that many factors influence the responses of prospective jurors during voir dire, the message of this Court has been that community prejudice against an accused may reach a point at which jurors cannot distinguish their bias from that of community sentiment, and, therefore, are incapable of disregarding that bias. *Irvin*, 366 U.S. at 728; *Murphy*, 421 U.S. at 802-803. This Court in these cases has explicitly held that voir dire may be used to impeach the asserted indifference of jurors (App. 737a, 738a).

An 84% proportion of a community prejudiced by pretrial publicity is beyond the influence of "statistical juggling." The federal magistrate and court of appeals properly gave considerable weight to this reliable indicator of community sentiment. The curcuit court found that, under the totality of circumstances, such overwhelming evidence of bitter community prejudice, when reflected in the opinions of seated jurors, was constitutionally unacceptable for jury selection.

The district court, although stating "these percentages are not remarkable to anyone familiar with the difficulty of selecting a homicide jury in Pennsylvania," *Yount* v. *Patton*, 537

F.Supp. 873, 882, did not cite a Pennsylvania or federal case to support such a conclusion. Few Pennsylvania cases have been surrounded by publicity as extensive as that related to the Yablonski murder cases; however, that publicity was reflected in only 23 of 81 (28%) jurors who expressed opinion (App. 864a). *Martin* v. *Warden*, 653 F.2d 799 (3d Cir. 1981), *cert denied* 454 U.S. 1151. Most relevant is that little difficulty was evident in the selection of a jury for Yount's first trial for the same offense in the same community; it required two days (App. 557a, 558a, 727a, 734a). Yount believes that at 84% and 90%, respectively, the instant case and *Irvin* stand far above the usual cases heard on appeal: *Murphy*, 421 U.S. at 803 (26%); *Beck*, 359 U.S. at 556 (25%); *Martin*, 653 F.2d at 806 (30%). The trial judge observing voir dire would easily recognize such evidence of prejudice without resorting to calculations or percentages. To give substantial weight to such relevant indications of juror prejudice would in no way threaten the voir dire system.

Yount has not challenged the latitude permitted by the trial court in examining veniremen during voir dire; however, such latitude in this case is meaningless if not accompanied by a liberal granting of causal challenges to eliminate any possible jury bias. The court of appeals found that the trial judge was not liberal in using his authority to dispose of veniremen with admitted opinions adverse to the accused. Judge Hunter noted that "each of the 117 veniremen dismissed for cause by the trial court had expressed a disqualifying prejudice which required dismissal." He went on to note that "the trial court refused to dismiss several veniremen who had expressed a disqualifying prejudice, and permitted some of them to sit as jurors" (App. 863a, n. 24). In addition, the court found that "twelve other veniremen state that they had an opinion at one time but claimed they would not carry it into the jury box . . . five were seated as jurors." (App. 849a, n. 14).

The instant case will turn on its own facts and merits. Generalizations are unnecessary to find constitutional error.

Judge Stern, concurring with the circuit court's holding, asserted that:

> Under any test reflecting even the most minimal respect for the values embodied in the sixth amendment, we would be compelled to invalidate this conviction (App. 869a).

Ultimately, the controlling question is whether the jurors who decided the case were capable of reaching a fair verdict based solely on the evidence presented in court under the totality of circumstances considering the prejudicial publicity, the adverse community sentiment reflected in voir dire, and the testimony of the jurors selected. The record supports the conclusions of the circuit court that despite assurances of impartiality, the jurors could not set aside their opinions and render a verdict based solely on the evidence. Under these circumstances the retrial of Yount was not fundamentally fair.

CONCLUSION

The United States Court of Appeals for the Third Circuit found that Yount had shown that the pre-retrial publicity caused actual prejudice in Clearfield County to a degree rendering a fair trial impossible and that his jury included at least one juror whose disqualifying testimony raised a presumption of partiality. After examining the totality of circumstances, the court of appeals concluded that Yount's trial was not fundamentally fair.

The decision of the United States Court of Appeals for the Third Circuit, that a writ of habeas corpus shall issue unless the

Commonwealth of Pennsylvania affords Yount a new trial, should be affirmed.

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